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OCTOBER TERM, 1902.

WILLIAM A. WRIGHT, Comptroller General, *Petitioner*,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO., and THE ATLANTIC COAST LINE RAILROAD CO., *Respondents*.

No. 20.

Petition for Writ of Certiorari.

Brief of BOYKIN WRIGHT and JNO. C. HART, Solicitors for Petitioner.

RICHARDS & SHAVER, STATIONERS AND PRINTERS, AUGUSTA, GA.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

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vs.
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No. —.
Petition for Writ of Certiorari under Section 6 of the Act of March 3rd, 1891.

Brief of BOYKIN WRIGHT and JOHN C. HART,
Solicitors for Petitioner.

STATEMENT.

This was a bill filed in the Circuit Court of the United States for the Northern District of Georgia, by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, against William A. Wright, Comptroller General, to enjoin the latter from collecting from the Georgia Railroad & Banking Company, State taxes on certain shares of stock in the Western Railway of Alabama, complainants being the Lessees of the Georgia Railroad and liable under the terms of the Lease for taxes assessed against the Lessor.

The Lease was for ninety-nine (99) years from the first day of April, 1881.

Among the properties leased by the Georgia Railroad & Banking Company was its interest in the Western Railway of Alabama, which at the time of the Lease, was jointly owned by the Georgia Railroad & Banking Company and the Central Railroad & Banking Company, as tenants in common, each of said Companies owning one half undivided interest therein. For copy Lease see Record, p. 22.

Subsequent to the Lease the owners of the Western Railway of Alabama, viz: the Georgia Railroad & Banking Company, and the Central Railroad & Banking Company, had the same incorporated under the laws of Alabama as provided for in the Lease, with a capitalization of $3,000,000.00, divided into thirty thousand shares of stock, fifteen

thousand to the Georgia Railroad & Banking Company, and fifteen thousand to the Central Railroad & Banking Company. These fifteen thousand shares of stock have been held ever since, and are still held by the Georgia Railroad & Banking Company in the State of Georgia, the income of which, however, is paid over annually to the Lessees. The Georgia Railroad & Banking Company executed to the Lessees a Power of Attorney to vote said stock at the Stockholders' Meeting.

These fifteen thousand shares of stock are the property which the Comptroller General claims is subject to taxation. The object of the Bill was to enjoin the collection of this tax on the ground that there is no law authorizing the taxation of shares of stock held by a resident owner in a foreign corporation. An agreed statement of facts was entered into by the parties in writing and filed with the record in the case, to which reference is here made. An Answer was also filed in which a Demurrer was set up and a Motion to Dismiss the Bill, for want of equity, and because complainants had no such interest in the matter complained of as entitled them to maintain the Bill; the point being that the Georgia Railroad & Banking Company and not Lessees were the proper parties to bring this Bill, if maintainable at all.

There being no controversy as to the facts there were presented to the Court but two questions:

(1) Did the complainants have such interest in the matter complained of as to entitle them to maintain said Bill and such equity as to entitle them to relief by injunction?

(2) Whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad & Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia?

Judge Newman decided both of these questions in favor of the complainants in the Bill, and granted an injunction against William A. Wright, Comptroller General, perpetually enjoining him from issuing any execution or taking any steps to collect the taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Judge Newman in his opinion stated the issue as follows:

"It may be conceded first, as a general proposition, that the State has the power to treat shares in a corporation as distinct and separate property in the hands of the holders, should it desire to do so, for purpose of taxation; and further, if suitable legislation is enacted, it may carry out this purpose. This is supported by abundant authority, and is not questioned, as I understand, by counsel for the complainants in this case. Cook on Stock and Stockholders, Sec. 563; Tennessee v. Whitworth, 117 U. S. 129. Conceding this to be true, however, the real contention of counsel for complainants here is that the State of Georgia has not adopted this policy, and that the action of the Comptroller General in attempting to tax these shares is without authority of law."

See Record at p. 14.

SPECIFICATION OF ERRORS.

The Specifications of Errors set forth in the Circuit Court of Appeals were as follows:

First. That the Court erred in not sustaining defendant's demurrer to the bill, set up by way of answer, and dismissing the said bill, because:

(a) The complainants did not make such a case as entitled them in a Court of Equity to any relief from or against the defendants touching the matters contained in said bill, or any of such matters.

(b) Because there was no equity in said bill.

(c) Because complainants had no such interest in the matters complained of as to entitle them to maintain said bill, and to entitle them to relief by injunction.

Second. Because the Court erred in granting the injunction against William A. Wright, Comptroller General, perpetually enjoining him from issuing any execution or taking any steps to collect taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Third. Because the Court erred in granting the injunction against the Georgia Railroad & Banking Company, enjoining it from making any return of the shares of stock of the Western Railway of Alabama held by it, in the State of Georgia, for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed in the State of Georgia.

Fourth. Because the Court erred in holding and decreeing, "under the laws of the State of Georgia, and the decisions of its Courts, shares of railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia," and in not holding and decreeing to the contrary.

Fifth. Because the Court erred, under the facts and circumstances of the case, in holding and decreeing "that the said William A. Wright, Comptroller General, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as Comptroller General so to do," and in not holding and decreeing to the contrary.

The Circuit Court of Appeals affirmed Judge Newman's decision generally but filed no opinion

THE PETITION FOR WRIT OF CERTIORARI.

The Comptroller General of Georgia now files his petition to the Supreme Court of the United States for a writ of certiorari under Section 6 of the Act of March 3, 1891, requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination the said case, it being No. 1156 in the Circuit Court of Appeals, and specifies as errors of said Circuit Court of Appeals the same errors as above set forth; and in addition, stating the

following grounds why said writ of certiorari should be granted by this Court, to wit:

That the questions involved in said suit are of gravity and importance, in this:

(1) That the said suit and decision involved the question of interference by the United States Court by injunction with the State in the collection of its revenue and deprived the State in this particular case of the sum of $150,000.00, or other large sum.

(2) That said decision is in conflict with the decisions of the Supreme Court of Georgia interpreting that provision of the Constitution of 1877, declaring what property shall be taxed, and what property shall be exempt from taxation, the conflict being in this:

(a) That the said decision of the Circuit Court of Appeals for the Fifth Circuit holds that shares of stock in a foreign railroad are not property subject to taxation here, but mere representations or symbols of property, the only substantial property being that of the Railroad Company itself in the State where said railroad is located.

(b) That the said decision of the Circuit Court of Appeals in affirming the decision of the Circuit Court holds that the General Assembly of Georgia has the power to declare whether or not shares of stock in a foreign railroad or in any railroad shall be deemed and treated as property subject to taxation, whereas the Supreme Court of Georgia has distinctly held in several decisions to the contrary; and declared that the Legislature since the Constitution of 1877 has no power to classify subjects of taxation but that the said Constitution alone does this and forbids the Legislature from undertaking to classify subjects of taxation or to exempt any property not specifically exempted by that Constitution.

(c) The contention of the State of Georgia in this case is that since the Constitution of 1877, as interpreted by the Supreme Court of Georgia, all property not exempt by that Constitution is taxed, and that the Legislature not only has not exempted, but cannot exempt any item of property not specifically mentioned as exempt in that Constitution; and that inasmuch as shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself, these shares are taxable to the owner at its domicile.

(3) That the questions involved in said suit are of further gravity and importance in this, to-wit:

That the said decision of the Circuit Court of Appeals in holding that shares of stock in a corporation are not property but mere symbols of property is in conflict with the decisions of other Circuit Courts of Appeals and of the Supreme Court of the United States, and for this reason this Honorable Court should require the said case to be certified to it for review and determination, under and in conformity with the provisions of the said sixth section of the Act of Congress of March 3rd, 1891.

(4) That the questions involved in said suit are of further gravity and importance in this, to-wit:

That the said case was decided in the said Circuit Court of Appeals as well as in the Circuit Court upon the supposed authority of the decision of the Supreme Court of Georgia in the case of Wright, Comptroller General, v. Southwestern Railroad Company, reported in 64 Ga., 783, at 799.

Judge Newman rendering the opinion of the Circuit Court conceded that the State had the power to treat shares of stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783.

That decision is put on the theory that stock in a railroad is but so many shares of its property simply symbols or representations of the corporate property; and is contrary to the great weight of authority defining what a share is.

The said decision in 64 Ga., 783; was rendered under the Constitution of 1868 when the Legislature had the power to exempt from taxation any property either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga,, 80; (h. n. 1.)

But by the Constitution of 1877 the power to "exempt from taxation was taken away from the Legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80; (h. n. 2.)

Besides, when the decision in 64 Ga., was rendered there was no law requiring shares of stock in a foreign corporation to be returned for taxation as is now required by the Tax Act of 1898, and by the Acts of 1884-5, pages 28 and 30.

BRIEF OF ARGUMENT.

I.

COMPLAINANTS IN THE ORIGINAL BILL HAVE NO INTEREST AND NO EQUITY ENTITLING THEM TO RELIEF BY INJUNCTION.

After stating the fact of Lease and plaintiffs succession to the leasehold interest plaintiffs state their grounds for equitable relief in Section 13 to 19, both inclusive, of their Bill.

See p. 5 and 6 of Record.

It will be seen that it is not alleged that any tax or tax execution is *threatened* even against plaintiffs themselves, or their property. The demand for taxes on these shares is made upon the owner, the Georgia Railroad & Banking Company, and the levy and sale apprehended, is with respect to property of the Georgia Railroad & Banking Company.

Plaintiffs seek to connect themselves with the matter and to obtain a status in Court by showing that their leasehold interest might be effected if the threat were carried out.

It may be conceded that under the terms of the Lease, as between the Lessor and the Lessee, the Lessee by private covenant is obliged to pay these taxes, if legal.

But this private agreement between Lessor and Lessee does not affect the State's right to look to the real owner—Lessor—for its taxes, leaving the Lessor and the Lessee to adjust between themselves their respective rights under the Lease. Even if the State had the right to look to Lessees for the taxes it was not seeking to do so.

Plaintiffs allege that the demand for taxes is made on the Georgia Railroad & Banking Company and it is about voluntarily to return these taxes and pay them, they being illegal.

If so, how can that hurt plaintiffs?

Plaintiffs are liable to Lessor only for *legal* taxes, that is such as are collectible by law.

But plaintiffs say they are afraid the Georgia Railroad & Banking Company will voluntarily return the property for taxes and then allow the same to be collected by sale of the leased property, to the possession of which plaintiffs are entitled.

What reason have plaintiffs to apprehend that the Georgia Railroad & Banking Company would see their property thus sacrified to the payment of an illegal tax, and its interest therein lost forever?

None is stated in the Bill. Such an apprehension in baseless and does not furnish any sufficient ground to uphold an injunction by a Federal Court against the collection of a State's revenue.

The Court will not assume that the Georgia Railroad & Banking Company will do a foolish or senseless thing to its own hurt.

Besides, if the Georgia Railroad & Banking Company pays the tax it could not recover the same from complainants, if illegal; if it refuses

to pay and resists the payment the State could not collect the tax if illegal. How, therefore, could complainants be hurt in either event?

But would the Georgia Railroad & Banking Company either voluntarily pay an illegal tax or suffer its property to be sold to pay an illegal tax?

Will this Court exercise its extraordinary power of injunction and enjoin a sovereign State's taxes on the assumption that the Georgia Railroad & Banking Company will do such a foolish and such an unreasonable thing?

If the tax is illegal, of course, the Georgia Railroad & Banking Company will resist it by its proper remedies, either at law or in equity. It would have every reason of self-protection to do so.

Will this Court allow plaintiffs to litigate for and in behalf of the Georgia Railroad & Banking Company on the bare assumption that the Georgia Railroad & Banking Company will not litigate for itself and protect its own rights, simply because, under a lease contract with the Georgia Railroad & Banking Company, the Lessee has covenanted with the Lessor to be responsible for the taxes. Why should the State be thus forced to litigate with strangers in collecting taxes due by its own citizens?

Besides, the Georgia Railroad & Banking Company as Lessor is bound to protect Lessee in the undisturbed possession of the leased property, and should it fail to do so by allowing any portion of it to be seized to pay an illegal tax, the Georgia Railroad & Banking Company is solvent and amply able to respond to plaintiffs in a suit to enforce their rights under the Lease.

As was said in Shelton v. Platt, 139 U. S., 591:

"Irreparable injury is the sole ground upon which jurisdiction in equity can be regarded as invoked in this case. * * * * So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the Express Company to pay the amount of the tax as claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature *irremediable*. The bill showed the Company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy."

139 U. S., 591, et seq.

THE LAW BEARING ON THIS POINT:

A threat to levy a tax execution does not amount even to duress, and a payment under such a threat would be purely voluntary.

Hoke v. Atlanta, 107 Ga., 416.

The plaintiffs in this case are merely intermeddlers.

See Zachry v. Zachry ,68 Ga., 158;
McPhee v. Veal, 76 Ga., 656;
Picquet v. Augusta, 64 Ga., 254;
Southwestern R. Co. case, 64 Ga., at 897.

In the last named case the Court say that the S. W. R. Co. could not enjoin tax execution issued against its dependent line, the Fort Valley & Hawkinsville Co. The latter Railroad Company alone could maintain such a bill.

64 Ga., at top 797.

In Missouri River, etc., R. Co , v. Wheaton 7 Kan. 232, the syllabus is as follows:

"A person against whom no illegal tax has been assessed or levied upon, cannot, by injunction, restrain the collection of an illegal tax against another person."

7 Kan. 232.

In the same case the Court says:

"Can A. against whom no illegal tax has been assessed, maintain an action against the officers of Bourbon County, because they have assessed an illegal tax against B? We answer this question in the negative, and without any comment proceed to the next question."

Missouri River, etc. R. Co. v. Wheaton, 7 Kan. 232.

A stipulation by Lessee to pay taxes obligates him to pay only valid taxes; if Lessor paid or suffered to be collected out of its property illegal taxes plaintiffs would not be liable.

Clark v. Coolidge, 8 Kan. 189;
Bristol v. Hammacher 30 N. Y. Misc. 426.

Even if Lessor paid such a tax under duress plaintiff would not be liable

Kimball v. Corn Ex. Nat. Bank. 1 Ill. App. 209-217.

A single suit would determine once and forever the taxability of these shares; hence multiplicity can furnish no ground for equity.

Johnston v. Stone, 71 Miss., 593.
People's Nat. Bank v. Marye, 107 Fed. R. 570 at 577;
Bouton v. City of Brooklyn, 15 Barb. (N. Y.) 375.

FEDERAL COURTS OF EQUITY RELUCTANT TO ENJOIN COLLECTION OF A STATE'S REVENUE.

In the case above cited of People's Nat. Bank v. Marye 107 Fed. R., 570, Judge Waddill says:

"Courts of Equity are seldom called upon to exercise a more delicate power than that of granting injunctions to enjoin the collection of a State's revenue. Such power on the part of Courts is expressly inhibited by the federal statutes as to taxes due the United States, and federal courts should proceed with great caution in exercising such power as to taxes due the State. It is a prerogative the exercise of which may result in great harm, and only where the right is clear, the necessity for action urgent, and the inadequacy of any other remedy apparent, should a Court of Equity interpose. The Supreme Court of

the United States, in Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 37, 19 Sup. Ct. 90, 92, 43 L. Ed. 354, 356, speaking through Mr. Justice Gray, said :

" 'The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States unless it clearly appears not only that the tax is illegal but that the *owner* of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction.'

"In Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65, a citizen of the State of New York, owning shares in a national bank doing business in the city of Chicago, sought by bill in equity to enjoin the collection of a tax assessed by the city of Chicago upon its shares, for the reason, among others, that the tax was unconstitutional and void, because not equal and uniform, as required by the constitution of the State, and because, such shares also were not taxable by the City at the domicile of the defendant. The Supreme Court, through Mr. Justice Field, at page 112, 11 Wall., and at page 66, 20 L. Ed , said :

" 'Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a Court of Equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatenad injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked.'

" 'In the State Railroad Tax Cases, 92 U. S.. 575, 613, 615, 23 L. Ed., 669, 674, Mr. Justice Miller speaking for the Supreme Court, after stating that it had been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularily, of itself, gave the right of injunction in a Court of Equity, said :

" 'We do not propose to lay down in these cases any absolute limitation of the powers of a Court of Equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisprudence, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a Court of Equity to interpose by injunction to stay the collection of a tax.'

"It is well settled that a suit to enjoin the collection of a tax will not be entertained in Courts of Equity—at least in those of the United States—in which the sole ground set forth in the bill is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that the remedies in a court of law are inadequate, and so bring the case under some recognized head of Equity jurisdiction."

Per Taft, C. J. in Taylor v. Louisville, etc., R. Co. (C. C. A.) 88 Fed. R. 350, 357, citing the following cases:

Ogden City v. Armstrong, 168 U. S., 224, 236;
Express Co., v. Siebert, 142 U. S., 339;
Allen v. Car Co., 139 U. S., 391;
Railway Co. v. Cheyenne, 113 U. S., 516, 525;
Hennewinkle v. Georgetown, 15 Wall, (U. S.) 547;
Dows v. City of Chicago, 11 Wall. (U. S.) 108.

In Lumber Co. v. Town of Hayward, 20 Fed. R., 422, 425, Bunn, J. said:

"I am aware that some of the State Courts, particularly in Illinois, have gone a considerable way in the direction of allowing an injunction to restrain the collection of a tax. But we have seen and may see further by a reference to the decisions, what is the attitude of the general government, legislative and judicial upon this subject. And the general doctrine holds good by the weight of authority, state and national, that equity will not interfere except in special cases, as of fraud, to save a multiplicity of suits, or prevent irreparable injury or a cloud upon title to land."

In Pacific Express Co. v. Siebert, 142 U. S., 339, 348, Mr. Justice Lamar, in discussing equity jurisdiction to restrain collection of taxes said:

"When the illegality of the tax or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further, and make out a case that can be brought under some recognized head of equity jurisdiction."

Judge Newman says:

"Under the Georgia law, where tax is sought to be collected without legal authority, an injunction is the proper remedy. 64 Ga. 783-801; 71 Ga. 24-30; 85 Ga. 647-650; 107 Ga. 384.

"The same relief may be granted in the United States Courts as in a State Court, if the citizenship is proper."

154 U. S. 362-391;
168 U. S. 611-613."

Concede that under our State's decisions the Georgia Railroad & Banking Company, of whom alone the tax is demanded, could maintain the bill, what possible equity have the complainants from whom the Comptroller General claims no tax? If there is no law for the tax, why shall not the Georgia Railroad & Banking Company enjoin or resist it; if it pays the tax, it could not recover the same from the complainants; if it refuses to pay and resists, the State cannot collect it, if illegal.

The cases relied on are not in point.

The point is not that the Georgia Railroad & Banking Company might not, if citizenship were proper, maintain such a bill, but that these complainants are not in a position to do so. They can show no equity, because they have no interests that will suffer by the acts

claimed to be apprehended. If the tax demanded of the Georgia Railroad & Banking Company is without authority of law, the complainants have only to remain quiescent. In no event will they have it to pay.

II.

TAXATION OF THE SHAREHOLDER IN CORPORATIONS.

"Shares of stock in a corporation held by any person are taxable as such notwithstanding the fact that the corporation itself has paid a tax on its property, or its capital stock or both."

25 Ency. of Law, p. 662;
1 Ta lor on Private Corporations (2nd Ed.) 477 Sec.
Desty on Taxation (1st Ed.) Vol. 1, p., 356;
109 Ga., at 69 and 72;
State Bank v. Richmond, 79 Va., 113;
Memphis v. Ensley, 32 Am. R., 532;
Cook v. Burlington, 44 Am. R., 679;
Seward v. Rising Sun, 79 Ind., 353, reported in 13 Am. & Eng. R. Cas., 315

This is true because the "capital stock" and the "shares" are distinct properties.

25 Ency. Law, 663;
94 Ga., (201) 202;
136 U. S., 549 (Law Ed.) 527;
109 Ga., 63 at 69 and 72;
70 U. S., 573-584;
85 U. S., 206-230;
117 U. S., 129;
119 U. S., 265;
Cleveland Trust Co. v. Lander U. S. Sup. Ct. Oct. Term, 1901, decided April 1, 1902;
Van Allen v. Assessors, 3 Wall, 573.

In the case last above named Mr. Justice Nelson of the Supreme Court of the United States says:

'The tax on the shares is not a tax on the capital of the Bank. The corporation is the legal owner of all the property of the Bank, real and personal * * * * The interest of the shareholder entitles him to participate in the net profits earned by the Bank in the employment of its capital, during the existence of its charter, in proportion to the number of shares * * * * This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him."

3 Wall (U. S.) at page 583;

Read 136 U. S., 459 (Law Ed.) 527 1st column and citations.

To the same effect as above:

Burroughs on Taxation (1st Ed.) Sec. 86;
Cook on Stock and Stockholders and Corp. Law (2nd Ed.) Sec. 563-565;

Bradley v. Bauder, 36 O. St., 28, reported in 38 Am. R., 547;
Porter v. Rockford, etc. R. Co., 76 Ill., 561;
Danville Bank, etc. Co. v. Parks, 88 Ill., 170;
State v. Branin, 23 N. J. L., 484;
Minot v. Philadelphia, etc R. Co., 18 Wall. 206;
Commonwealth v. Delaware Division Canal Co., 2 L. R. A. 798, notes;
New Orleans v, Hous on, 119 U. S., 265;
44 Am. R , 679;
136 U. S. (Law Ed.) 527 1st column and citations.

TAXATION OF SHAREHOLDERS IN FOREIGN CORPORATIONS:

"A tax may be levied on shares of stock in foreign corporations, by the State of the owner's residence. This rule is not affected by the fact that the corporation has in its State paid taxes on capital stock or property or both."

24 Ency. of Law, pages 663, 664;
Sturgis v. Treasurer, 114 U. S., 511;
Worthington v. Sebastian, 25 Ohio State, 1;
McKeen v. Northampton, 49 Pa St., 519, reported in 88 Am. D., 515;
Worth v. Ashe Co., 82 N. C., 420, reported in 33 Am. R., 692; also 688;
State v. Branin, N. J. L., 484;
State v. Bentley, 23 N. J. L., 532;
Newark City Bank v. Assessor, 30 N. J. L., 13;
Seward v. Rising Sun, 79 Ind., 351, reported in 13 Am. & Eng. R. Cas. 315.

In the last above cited case the Court said: (a case distinctly in point) "There is no provision in our statutes, which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations * * * In the absence of any statute to the contrary, although a corporation may be taxable for its corporate property, the owner of shares of its stock may be taxed therefor where they reside."

13 Am. & Eng. R. Cas., 315.

This was upheld on the idea merely that "stock was personal property." There was no statute law declaring stock to be property. There was not even a question to the tax payer for listing "stock in foreign corporations." (See page 316.) It merely relieved shares in domestic corporations.

To the same effect:

Dwight v. Mayor, etc., of Boston, 12 Allen (Mass.) 316, reported in 9 Am. D., 149;
Dyer v. Osborne, 11 R. I. 321, reported in 23 Am. R., 460:
Bradley v. Bauder, 36 O. St., 28, reported in 38 Am. R., 547;
Appeal Tax Court v. Gill, 50 Maryland, 377.

In Dyer v. Osborne, above cited, Chief Justice Durfee said:

"The laws of *Rhode Island* are paramount in *Rhode Island* and all inhabitants of the State are subject to them without regard to the laws of any other State. * * * * It would certainly be going too far to hold that a man of wealth in *Rhode Island* cannot be taxed at all, if his property invested in the stocks of a manufacturing corporation of another State and there subject to taxation."

Ib.

23 Am. R., 460;

See, Worth v. Ashe Co., 90 N. C., 409.

"Certificates of stock of a foreign corporation held by a citizen of Ohio are taxable in that State, though a tax is also imposed on the property of such corporation situated in the State."

Sturgis v. Merchant Carter Treasurer, 114 U. S., 511 h. n. 4. (Law. Ed.) 240.

In the last above cited case the Western Union Telegraph Company was taxed upon such of its telegraph lines and property as were located in the State of Ohio; yet the Court held that a shareholder in the W. U. T. Company, residing in Ohio, was properly taxed upon his shares in the Telegraph Company, notwithstanding that the Telegraph Company was taxed upon its entire capital stock in the State of its incorporation, and also upon that portion of its property located in the State of Ohio.

114 U. S., 511.

But it is not denied by counsel for the Railroads that the foregoing is the general law. They admit that the authorities sustain taxing stock and property it represents as distinct properties assessable against separate and distinct owners.

They admit that Georgia *might* treat each as taxable property.

But they contend:

(1) That to tax the shares of the stockholders and the property of the corporation is double taxation, and hence the authority to so tax must be expressly given or necessarily implied by the tax act;

(2) That there is no express law, in Georgia, requiring a resident shareholder in a foreign corporation to pay taxes on his shares;

(3) That the law of Georgia has fixed the situs of shares of stock in a foreign corporation at the domicile of the corporation, and not at the domicile of the shareholder.

III.

NO DOUBLE TAXATION.

Taxing shares of stockholders and also property of corporation, not generally regarded as double taxation, because they are different properties and assessed against different owners.

25 Am. & Eng. Ency of Law, pages 666, at 670, citing many authorities;

95 U. S., 679–687;

114 U. S., 511 (Law. Ed.) 244.

In 95 U. S., 679–687, the Supreme Court of the United States, say: "The capital stock and the shares may both be taxed, and it is not double taxation."

95 U S., 679–687 (Law. Ed.) at 560.

"Double taxation in a legal sense does not exist unless double tax is levied upon the *same property* within the *same jurisdiction*."

Bradley v. Bauder, 36 Ohio St., pages 28–29, reported in 38 Am. R., at 548.

"The laws of the State of Ohio are not material. Where property is taxable by the laws of this State (Ind.) it is immaterial how much it is taxed elsewhere."

Seward v. Rising Sun, 13 Am. and Eng. R. R. Cas., at 316 (79 Ind. 353)

"Power to tax shares of stock, owned by our citizens in corporation located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same whether the capital of the corporation is there taxed or not; otherwise the power of taxation conferred by the Constitution would be made to depend upon the operation of the laws of a foreign jurisdiction—a proposition so obviously ill-founded that the moment it is stated its falsity becomes apparent."

36 Ohio St , 28, et seq., reported in 38 Am. R. at 549 and 550.

"The owner of a share of stock owns no part of the capital of the Company. The stock is personal property, which upon the death of the owner goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and in so doing works no change or modification in the title to the corporate property. From this it would seem to result necessarily that its *situs* for pu poses of taxation, when not otherwise provided by statute, is that of the domicile of the owner."

Badley vs. Bauder, 36 Ohio St., 28 et Seq., reported in 38 Am. R., 549.

The injustice which sovereignties generally seek to avoid is "double taxation" by the *same sovereign*.

Manifestly this principle cannot be applied as between *different sovereigns*.

Such a rule would operate in a way to deprive one State of its right to tax because some other State may have wrongly attempted to tax the same property.

If no double taxation, then there is no room for the rule of construction insisted upon applicable only in cases of double taxation.

In a learned note on this subject in 13 Am. and Eng. R Cases, at page 319, the following is stated as the result or conclusion of the law on this point, viz:

"The conclusion at which we have arrived may be thus summed up: a holder of stock in a foreign corporation is liable to be taxed on such stock in the State where he is domiciled.

The capital stock itself may also be taxed in the foreign State which is the domicile of the corportion.

The presumption is that the intention of the law was not to impose the latter tax. Clear and indisputable language must be used to overcome this presumption."

13 Am. & Eng. R. Cases, at page 319.

The above case held:

"That shares of stock in incorporated companies (foreign), whether the property of such companies be tangible or intangible are personal property;" and are taxable at the domicile of the owner.

13 Am. & Eng. R. R. Cases, at 315.

THERE IS NO OPPRESSION OR TYRANNY INVOLVED IN THIS TAXATION. It was claimed, with some degree of fervor and heat, by counsel for the Railroads that for the State to tax these shares when the property of the corporation was taxed in Alabama, would be *oppressive* and *tyranical*. Not so. The right to tax is not based upon a mere fiction or technicality of the law, but upon the substantial consideration that both the owner and his property in the shares enjoy the protection and benefit of the laws of this State and should on that account contribute their pro rata to the support of the Government. This view is ably stated *in re* Greenleaf (Ill.) 56 Northeastern Rep, at page 296.

In the above case the Supreme Court of Illinois declare:

"The shares of stock in the Kansas corporation held and owned by appellant are property within the jurisdiction of this State. They may be the subject of contracts of sale, barter or exchange under our laws; and the power of our laws may be invoked to enforce or defend such contract, and also to protect the property interest of Appellant in them against force, fraud, or theft. He is a resident of the State, and is entitled to invoke the authority of the State and the aid of our Courts to protect his property, including these shares of stock * * * * If the stock be not assessed for taxation, he will enjoy the benefits of the organized power of the State for the protection of his property rights and interest therein without being required to contribute to the support of the State Government in proportion as he enjoys its advantages and protection."

In Re Greenleaf, 56 Northeastern Rep., at page 296.

IV.

UNDER THE LAWS OF GEORGIA SHARES OF STOCK ARE TREATED AS PERSONAL PROPERTY AND SUBJECT TO TAXATION.

The lawyers for the Railroad Company and Judge Newman conceded that the State has the *power* to treat shares of stock as distinct and separate property for purposes of taxation, but say that the State of Georgia has not adopted this policy. Let us see:

The Constitution of Georgia prescribes an *ad valorem* tax on *all* property subject to taxation.

Section 5883 Georgia Code.

All property in the State divided in two classess only—that subject and that not subject to taxation.

82 Ga , 138.

84 Ga., 683.

Shares of stock in railroad companies not included in the exemptions authorized by the Constitution.

Georgia Code 5884, 5886.

Shares of stock in Georgia are personal property.

Georgia Code, Sec. 3070.

"Shares of stock in railroad companies shall be *deemed personal property.*"

Sec. 2165 of the Code;

40 Ga , 408 ;

94 Ga., 201 202 ;

109 Ga., 69-72 .

"All stocks and securities whether in corporations within this State or in other States" shall be construed to bee personal property for purposes of taxation.

Acts 1884-5, p. 28-30.

Shares of stock separate property from property of corporation.

94 Ga., 201-202 ;

58 Ga., 190 ;

95 U. S., 679 ;

96 U. S. 193 ;

109 Ga., 69-72.

The Legislature has no power to classify subjects of taxation. This our Constitution forbids when applied to property. The Constitution alone does this.

109 Ga., 70.

The decision in 109 Ga., at 72, distinctly declares that shares do not represent the property of the corporation, and that tax on the shares are a direct tax on property, viz., the property of the shareholder and not the property of the corporation.

109 Ga., at 72 and top of page 73.

To the same effect 109 Ga., page 80, et seq.

Any property which claims exemption must show express authority for said exemption.

104 Ga., at 297.

113 Ga., 883, at 885

74 Ga., 413.

Sturgis v. Carter, 114 U. S., 511.

Railroad companies are required to return each "class or species of property"—all property—to be "taxed as other property of the people of this State."

Code Sec. 780.

Likewise ordinary tax-payers are required to return specifically all property, including obligations for money, etc., whether the same are within or without the State.

Code Sec. 833.

The question then resolves itself into a simple one, viz: Are railroad shares "property;" if so and not exempt, the laws of Georgia tax them.

Code Secs. 780-833.

But the very tax act under which these taxes are claimed, *expressly* requires the shares of stock in a foreign corporation to be returned for taxation by the tax-payer, under oath.

Acts of 1898, page 36, Sec. 16, Par. 30, 31 and 32.

Also in this very Act the Legislature *recognizes* "stocks" as *property to be taxed*, in requiring "that the Agent in this State, or any person, firm or corporation, resident without this State, who shall have on hand for sale, storage, or otherwise, as such Agent, any merchandise or other property including money, notes, accounts bonds *stocks*, etc., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property of the State is taxed."

Acts of 1898, page 29.

Also the Act of 1884, p. 28-30, declares: "all stocks and securities whether in corporations within this State or in other States" to be personal property "for purposes of taxation."

Act 1884-5, p. 28-30.

In Georgia the Constitution classifies the subjects of taxation. The Legislature has nothing to do with it. By the Constitution all property is taxed, except religious, charitable, public or educational property.

109 Ga., 68 and 70.

But if the legislative intent be considered of importance, how could that intention be made more manifest than in the said Act of 1898 and in said Act of 1884-5, p 28-30.

V

IT IS NOT NECESSARY THAT THE TAXING LAW SHOULD SPECIFY A PARTICULAR ITEM OF PROPERTY FOR TAXATION; IT IS ENOUGH IF IT COMES WITHIN THE CLASS OF PROPERTY MADE TAXABLE.

A tax upon "shares of stock" has been repeatedly upheld upon such general provisions of the law as provide for the taxation of "personalty" or "personal property," or "all property" not exempt.

See Seward v. Rising Sun, 79 Ind., 351, reported in:

13 Am. & Eng. R. Cases, 315, 316;

Dyer v. Osborne, 11 R. I., 321, reported in 23 Am. Rep., 460;

Dwight v. Mayor of Boston, 12 Allen, 316, reported in 90 Am. Dec., 149;

McKeen v. County of Northampton, 49 Pa. St., 519, reported in 88 Am. Dec., 515.

In Seward v. Rising Sun, cited above, the law simply provided a tax "upon all personal property" owned by persons residing in this State, etc., the Court held that the "shares of stock in incorporated com-

panies, whether the property of such companies be tangible or intangible, are personal property. Cooley on Taxation 16, 2 Kent. Com. 340, note," and, therefore, taxable under this provision.

13 Am. & Eng. R. Cases 315, 316.

In Dyer v Osborne, the law under which the shares of a resident stockholder in a foreign corporation was taxed, declared merely "That all real property in the State and all personal property belonging to the inhabitants thereof shall be liable to taxation unless otherwise specially provided." Section 10 of Chapter 39, declared as our Code declares, that "personal property" included stocks or shares in corporations not exempted from taxation.

23 Am. Rep. 461.

On this general provision, the Court held:

"The owner of shares of stock in a foreign corporation, is liable to taxation thereon in the State where he resides, although he has paid tax thereon in the State where the corporation is located."

23 Am. R. 460.

Likewise in Dwight v. Mayor of Boston, the shares in foreign corporation were taxed merely under the law taxing "all personal estate," the Court holding that as such they were taxable in the place where the owner resides.

90 Am. Dec., at 149.

Likewise, in McKeen v. County of Northampton, "shares of stock" were subjected merely under the general law taxing "personal property," the Court holding:

"The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him and when he dies, his domicile governs its succession. It goes to his executor or administrator, and not to the heirs, and is carried into the inventory of his personal effects * * * * Its ownership has its legal *situs* at the domicile of the owner."

88 Am. Dec., at 516 and 517.

We insist that the Tax Act of 1898 specifically requires the return of these shares for taxation but the foregoing decisions are cited to the point that such specification is not necessary since the Constitution of 1877 requires *all* property to be returned for taxation, except that which it specifically exempts, and the Code and the Act of 1884-5, p. 28-30, and the late decisions of our Supreme Court declare shares of stock to be personal property and separate and distinct from the property of the corporation.

Code §3070, 2165; 109 Ga 72.

94 Ga. 202.

109 Ga. 80.

The Supreme Court of Georgia in its very latest deliverance on this subject in 109 Ga., at pages 96 and 97 has declared in language that is unmistakable what property the Constitution taxes, as follows:

"The language would seem to be plain, its purpose unmistakable, to require all property to be taxed not only uniformly, but ad valorem. It left no loophole to escape. There was to be no classifying of prop-

erty; no exempt property except that specifically allowed to be exempted by the Constitution. The rule was absolute: Property, tax according to value."

109 Ga., at 96.

Again, in this very decision the Court declares:

"Once for all, the Constitution has enumerated the two classes of property, which enumeration the legislature, the courts, and the citizens must recognize as exhaustive; property, whatever its species, is simply exempt or subject to be taxed. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value * * * * If this is not a clear, plain and pointed statement, I despair of attempting to express the idea more strongly. If any part of the act of the Legislature is contrary to the Constitution, that instrument in express terms provides that it shall be the duty of the courts to so declare it."

109 Ga., at 97.

VI.

SHARES OF STOCK IN FOREIGN CORPORATIONS HAVE THEIR SITUS, AND ARE TAXABLE IN THE STATE IN WHICH THE OWNER RESIDES.

That the above is true, both at common law and according to the great weight of authorities, is not denied. As stated by the Supreme Court in 18 Wallace 206, (Law Ed.), at 896, *shares of stock* are "an interest or right which accompanies the person of the owner, *having no locality independent of his domicile.*"

18 Wall, 206 (Law Ed.) at 896,
Van Allen v. Assessors, 3 Wallace, 583;
Union Bank v. State, 9 Yerg. 501;
Bradley v. Bauder, 36 Ohio St., 28, reported in
38 Am. Rep., at 549;
Cooley on Taxation, 16;
Burroughs on Taxation, 188;
Cook on Stock and Stockholders (3rd Ed.) Sec. 566, note 2nd col.
McKeen v. County (Pa.) 88 Am. Dec., at 517.
Belo v. Commissioners, 82 N. C., 415, reported in
33 Am. Rep., at 690;
In Re Greenleaf, 56 Northeastern Rep. (Ill. Feb. 1900), at page 295 and 296;
State v. Kidd, 28 Southern Rep. (Ala.) 480; Affirmed U.S. Supreme Ct. Jan'y 2-31
See, Notes 56 Am. Dec., at page 528.

Of course the State of Alabama could not fix the *situs* of shares of stock held in Georgia by citizens of this State.

"One State cannot impair another's right to tax property within its limits."

See, 56 Am. Dec., notes at page 528;
Appeal Tax Court v. Patterson, 50 Maryland, 354;
Seward v. Rising Sun, 13 Am. & Eng. R. Cases, at 316, where the Court holds:

"There is no provision in our Statutes (Statutes of Indiana) which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations. * * * * The laws of the State of Ohio are not material. Wh re property is taxable by the laws of *this* State it is immaterial how much it is taxed *elsewhere*."

13 Am. & Eng. R. Cases, at 316, near bottom;
36 Ohio State, 28, reported in
38 Am. Rep., at 549 and 550.

In McKeen v. County, above cited, the Court say:

"Though local authority may attach to the stock for special purposes, its *ownership* has its *legal situs at the domicile of the owner*."

88 Am. Dec., at 517.

Hence the Supreme Court of the United States in 177 U. S., 1, he'd that Michigan for certain special purposes could fix the situs of shares of its own corporations in that State, and sustained an action to remove the cloud upon the title to the shares of stock on the ground that said shares under the Michigan statute were located th re for purposes of jurisdiction in that case.

177 U. S., 1.

While the Court seemed to express doubt as to whether Michigan could give said shares a situs for purposes of *taxation*, it never remotely hinted that said shares were not subject to taxation in Massachusetts, where the owner of some of the shares resided. This had already been settled by that high Court.

95 U. S., 679 (Law. Ed.) 558;
96 U. S., 193 (Law. Ed.) 654;
114 U. S., 511 (Law. Ed.) 244; and several later decisions.

Has the State of Georgia changed the rule and fixed the situs of shares of stock at the domicile of the corporation and not at the domicile of the owner?

Confessedly, neither the Constitution nor the General Assembly has done so. But it is claimed that this has been accomplished by certain decisions of the Supreme Court of Georgia; the one chiefly relied on being Wright, Comptroller, v. S. W. R. R. Co., 64 Ga., at 799. We will discuss this decision presently. The other decisions cited appear not to be in point. But granting that the Courts could thus fix the situs of shares without authority of the Constitution or of the Legislature, and in contravention of the established doctrine that the situs of shares of stock is at the domicile of the owner, and that 64 *Ga.*, *did so*, an entirely *different rule* has been since established by the General Assembly, and by later decisions of the Supreme Court interpreting the new system of taxation embodied in the Constitution adopted subsequent to that decision.

See, Tax Act of 1898, pages 35 and 36; Acts 1884–5, p. 28–30.
Georgia B. & L. Association v. Savannah, 109 Ga., 69, 70, 71, 72;
Atlanta, etc. Co, Stewart 109 Ga., 80 et seq.;
94 Ga., 202.

Clearly the Legislature had in mind in framing the Tax Act of 1898

the fact that many items of property subject to be taxed under the new Constitution, including shares of stock in foreign corporations, had hitherto escaped the tax officers; hence it provided as follows:

"In addition to the questions now propounded to taxpayers by the Tax Receivers, questions shall be framed by the Comptroller General to reach *all* property upon which a tax is imposed by this act, and especially the following questions: * * * How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporation located without this State? What was the gross nominal value thereof? What was the fair market value thereof?

Acts of 1898, page 35, near top, and page 36, near bottom.

Here the Legislature expressly provides the "machinery" for placing railroad shares in foreign corporations on the Tax Digest.

(109 Ga., 80, et seq.)

The law defining what property should be taxed (Consti. of Georgia, Code Sec. 5883 and Sec. 780, Vol. 1 of the Code) was already broad enough and needed no addition or revision. It was only necessary to provide the "machinery" for placing it upon the Tax Digest. This it did by the provision above quoted.

In the same Act (1898 at page 29) as we have seen, stocks of a non-resident owner held by an Agent in this State are required to be returned for taxation.

Acts of 1898, page 29.

In the light of the foregoing, and of Sections 3070 and 2165 of the Code and the Act of 1884–5, p. 28–30, declaring shares of stock to be personal property for purposes of taxation, can the Court escape the conclusion that these shares held here by the Georgia Railroad & Banking Company are taxable as property, under the Constitution and laws and decisions of this State?

ARGUMENT.

To recapitulate:

What does the law of Georgia tax? This question is answered by the Constitution of the State, which is the Supreme law. In Georgia relatively to taxation there is only one classification of property—it is either exempt from taxation or subject to be taxed and if subject to be taxed the Constitution taxes it. If exempt it pays nothing; if subject it pays according to its value.

Verdery v. Village of Summerville, 82 Ga., 138.

Under the Constitution of Georgia if property is taxed all of it must be taxed except that exempt in the Constitution. "Taxation on property must be upon all not exempted in the Constitution with a uniform rate on all kind.

Mayor v. Weed, 84 Ga., 683.

"The Constitution of the State requires that taxes on property should be ad valorem and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception."

Wells v. Mayor and Alderman, 87 Ga., 400.

In this case the Court says: "Whatever the expectation of purchasers or the unbroken practice of the City hitherto may have been the mandate of the Constitution of 1877 is to tax all property, save, that expressly exempted by the Legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

87 Ga., 401-2.

See also 107 Ga., 1-5.

"When the tax officer goes forth to list property which is taxable all that which he finds employed in the ordinary uses of common life, unless it belongs to the public, he is to regard as taxable."

Mundy v. Van Hoose, 104 Ga., 300.

The Constitution of Georgia requires that all property of every kind of all persons and corporations within the territorial limits of the authority levying the tax and not exempt by the Constitution shall be taxed.

In Atlanta Nat. Assn. v. Stewart, it is held that under the Constitution of Georgia, "The General Assembly cannot lawfully either expressly exempt from taxation, or accomplish this result by failure to tax any property except that which in the Constitution itself the General Assembly is expressly authorized to exempt."

(109 Ga., 80).

As to the subjects of taxation these are fixed by the Constitution and no other law is necessary. All property in the State must pay taxes unless it is exempt by the Constitution. These shares of stock are confessedly, not exempt and if they are property in the State they are subject to taxation as all other property. The General Assembly could not relieve them by express enactment nor by failure to tax. If they are property within the State it is the mandate of the Constitution, quoting the language of the Supreme Court that they should be taxed. That they are property will not be controverted. It only remains to inquire are they property within the State.

We have seen the general rule is that stocks are personal property and have their situs with the owner.

1 Moraeritz, Sec. 224-5-6: 2 R. I. 321 (23 Am. Rep. 460).
49 Pa. St. 519 (23 Am. Rep. 465);
82 N. C. (33 Am. Rep. 688 90);
15 Wall 324;
3 Wall 584;
4 Wall 258;
18 Wall 229-30;
2nd Woods 144;
62 Am. St. Rep 458;
Code of Georgia 1895, Sec. 3070;
30 Ga., 442;
40 Ga., 408;
50 Ga., 393;

Judge Newman concedes that the State has the power to treat shares of stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783

That decision is put on the theory that stock in a railroad is but so many shares of its property. As we have seen that theory is contrary to the great weight of authority defining what a share is.

Morawertz, Section 224-225;
69 Pa., 407;
50 Am. Rep. 131-2.
2 Woods 144;
1 Woods 18;
3 Wall 584;
18 Wall, 229-30.
94 Ga., 202.
109 Ga., 69-72.

Besides when the decision in 64 Ga., was rendered there was no law requiring shares of stock to be returned for t[illegible]ion as is now required by the Tax Act of 1898.

That act requires stock issued by corpo[illegible]ions located without the State to be returned for taxation. Why returned? The conclusion is irresistible that it was for taxation. The State could have no authority to institute such an inquisition except for taxation. Otherwise it would be not only a meaningless ceremony but an unauthorized and impertinent inquiry into the private affairs of the citizen. The Judge in the Circuit Court held that there should be a reasonably clear Legislative intent. Is not the intent of the Act of 1898 reasonably clear that the Legislature intended such shares should be returned for taxation and taxed. This provision of the act means something. If it does not mean that such shares are to be taxed what does it mean? If it does not mean this the tax payers could legally refuse to make this return. Would any Court so hold?

Certainly it cannot be maintained that the Legislature must say in *totidem verbis* that "shares of stock issued by a corporation located without the State are hereby taxed." That Act requires the taxpayers to return these shares of stock and the value on the day fixed for *the return of property for taxation.*

The legislative intent as to such shares of stock is as clear and unmistakable as to any other property to be returned for taxation. Is it not unmistakably clear under that Act that horses, mules, etc., improved city or town lots, money on hand, notes, accounts, judgments, fi. fas. against persons within or without the State, bonds issued by corporations in and out of the State and all the other property enumerated, are to be taxed? It will not be disputed that all these are to be taxed. If it is so clear as to all these, how does it become obscure or doubtful as to these shares of stock. They are all in the same Section of the same Act.

Whatever was the rule or policy of the State as declared in 64 Ga., 783, it is submitted with all confidence that the rule or policy as declared by the Act of 1898 is unmistakable that such shares of stock are to be taxed. The power to establish such rule or policy is conceded.

It is no answer to say that stockholders in other railroads do not pay a tax. It may be they should pay. But it is conceded that the State

has the right to fix a rule or policy. This being so, it could tax shares of a corporation out of the State and not tax shares of a corporation in the State—the capital stock or property being taxed. But it is said wh le the State has the power to fix such rule or poli y there "should be a clear expression of legislative intent." Has there not been such an expression? The Act of 1898 furnishes a simple, plain answer. It requires these shares of stock to be returned for taxation which would seem to be a clear, unmistakable expression that they are to be taxed. There is no other conceivable reason for this requirement.

Also the Act of 1884-5, p. 28-30, furnishes an answer.

How is the legislative intent to levy a tax on any property expressed except by authorizing the proper officer to assess and levy a tax and requiring the return of the property. This has been done as to this stock. It is conceded that the question is not what the State can do, but what it has done. That if there has been a clear expression of legislative intent to treat shares in a corporation as distinct and separate property in the hands of the holders, these shares must be taxed. Such intent is clearly apparent under the Act of 1898. If not what is the intent? Is the State inquiring after a mere symbol—a vanishing shadow? The property of the corporation is in Alabama and beyond reach. If it is the rule or policy of Georgia to regard these shares as also located there what right has Georgia to inquire of the tax payer how many he has or their value. The requirement that these shares and their value, must be returned for taxation is either meaningless—senseless and unauthorized or it is a clear declaration that they are to be treated as distinct and separate property in the hands of the holders. The State cannot treat them at all—it has no concern as to them unless they are distinct and separate property no more than it has with any other personal property physically located in Alabama. But it does treat with them and the conclusion is irresistible that it intended they should be regarded as distinct and separate property.

Our inquiry is not what was the rule or policy in Georgia twenty years ago when the decision in 64 Ga. was rendered under another tax system, but what it is now under a new system and a new Constitution intended to subject prope ty theretofore not taxed. If it be conceded that under that decision shares were to be regarded as only representing an interest in the property of the corporation and as in substance the same, it is admitted the State had the power to declare a different policy. It has clearly done so by the Act of 1898.

To now hold that these shares are so much interest in real property in Alabama would put the Legislature in the worse than ridiculous attitude of requiring a return of such an interest. Nor would its attitude be less ridiculous by changing the phraseology of the proposition and saying that these shares are a mere shadow of a substance that is located in another State. The Act of 1898 on the subject means something and it can mean nothing else than that whatever may have been the policy theretofore under that Act such shares should be treated as distinct and separate property in the hands of the holders. This being so it is conceded that they are to be taxed.

Besides in this very Act (1898, p. 29) the Legislature recognizes "stocks" *as property to be taxed*, in requiring that the "agents in this State of any person, firm or corporation resident without this State, who shall have on hand for sale, storage or otherwise, as such agent, any merchandise or other property including m ney, notes, accounts, bonds, STOCKS, &c., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property in this State is taxed."

Acts 1898, p. 29;

See also 94 Ga., at 202.

If 64 Ga., 799 under the old Constitution holds that stock in a corporation is only so much interest in the property of the corporation, see 109 Ga., 72, where the Court distinctly holds: That the tax on the shares of stock was a tax against the property of the shareholder and in no sense relieved the property of the corporation from taxation.

109 Ga., 71-72, citing 94 Ga., 202.

The Court further says: "There can, therefore, be nothing in the claim in this case that the shares of stock taxed represent the property of the corporation; nor from its nature, as above shown, can it be successfully contended that the tax provided for is anything but a direct tax on property."

109 Ga., 72.

COMMENTS ON 64 GA., 783 AT 799.

The dictum of Judge Jackson in 64 Ga., 799 (Wright, Comptroller, v. S. W. R. Co.) to the effect that shares in a railroad company simply represents the property which is real estate and is not taxable as property in the hands or the owner of the shares, was clearly not well considered at the time, and is now manifestly unsound in principle and at variance with established authority. (See authorities cited to this point in other portions of Petitioner's Brief.)

In extenuation of this deliverance in 64 Ga., the following is quoted from the decision itself at the conclusion, viz.:

"Indeed all the points decided (herein) may require revision when the case is fully tried and all the facts are brought out. The views given above are merely indications of what we now think, from our understanding of this record as it now appears."

64 Ga., at 801.

The above decision was rendered on the preliminary injunction and sent back for trial on its merits.

It should also be remembered that the case in question arose under the Constitution and laws existing before the Constitution of 1877 requiring all property to be taxed, except that which was therein specifically exempt.

It must also be remarked that by the express Statutes of Alabama where the W. A. Railroad is located, shares of stock in a railroad is declared to be personal property.

When the case in 64 Ga., was decided, the Legislature had the power to exempt from taxation any property, either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga., 80 h. n. 1.

At that time railroad shares enjoyed this immunity, because there was no provision made for *listing and assessing* this property.

But by the Constitution of 1877 the power to "exempt" from taxation was taken away from the Legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80 h. n. 2.

But the Legislature has not since tried to do so by *either* method. On the contrary in the Tax Act of 1898, page 36, the Legislature expressly provides for placing railroad shares in foreign corporations on the Tax Digest. Also in the Act of 1884, 5 p. 28 and 30, shares in foreign corporations were expressly declared to be personal property for purposes of taxation.

The law defining what railroad property should be taxed (Section 780 of the Code) was already broad enough and needed no addition or revision to make it conform to the Constitution of 1877.

It was only necessary, therefore, for the Legislature to provide the necessary machinery for placing it upon the Tax Digest. This it did in the Act of 1884–5 and the Act of 1898, which included all "taxable" property and submitted a specific question with respect to railroad shares in foreign corporations. And by the Constitution *all* property is "taxable" except that which is exempt.

CHOSES IN ACTION TAXABLE IN GEORGIA AT THE DOMICILE OF THE OWNER.

In 50 Ga., at 392, our Supreme Court, overruling 33 Ga., at 113, say:

"The property in bonds and notes or other obligations to pay money is located at the place of the residence of the owner of them, and that at least since the first of January, 1863, when the Code went into effect, such is the law of this State for purposes of taxation.

50 Ga., 392-3.

In the same case at page 393, the Supreme Court further says:

"But the current of authorities as to stocks, bonds and notes for money, very decidedly fixes their locality at the residence of the owner for taxation."

50 Ga., 393.

Here, the Court distinctly announces that in Georgia "stocks" as well as bonds, notes, etc., have their situs for taxation at the domicile of the owner.

50 Ga., 393;
Cited and approved in 104 Ga., 497;
Atlanta, etc., v. Stewart, 109 Ga., at 87; 90 Ga., 648.

"Bonds, notes or other obligations for money, on persons in other States, or of other States, or bonds of corporations of other States, and shipping are the subjects of return and taxation in this State."

Code Sec. 776;
50 Ga., 387, 392;
104 Ga., 497;
109 Ga., 87;
90 Ga., 648;
Acts of 1898, p. 36.

THE ACT OF 1884-5 AND THE CODE OF 1895.

But counsel for the railroads seek to get rid of the force of the Act of 1884-5, p. 28-30, declaring shares of stock in foreign corporation to be taxable by saying that this Act was not codified into the Code of Georgia of 1895.

This Act is substantially embraced in the Code of Georgia of 1895, and certainly nothing in the Code is in conflict with said Act.

See, Civil Code Vol. 2, Sec. 3070;
Civil Code Vol. 2, Sec. 2165;
Vol. 1 of Code, Sec. 833.

The substance of this Act being already embraced in the above named sections of the Code (Secs. 3070 and 2165) there was no occasion for its repetition.

But the omission from the Code of an Act in force before its adoption does not repeal said Act if not inconsistent with the provision of the Code.

See, 53 Ga., 675;
112 Ga., 40 (1);
42 Ga., at 195 and 196;
111 Ga., 760 at 768, 769 and 770.

Of course the adopting Act validates what is contained in the Code.

104 Ga., 831;
114 Ga., 533.

But it does not repeal pre-existing statutes which may not be incorporated in the Code.

Unless the contrary manifestly appears from the words employed the language of the Code should be understood as intending to state the existing law and not to change it.

107 Ga., 599.

But this Act of 1884-1885, pages 28 and 30, is cited mainly as a conclusive reply to Railroad Company's contention, as approvingly stated by Judge Newman, "that while the State has the power to treat shares as distinct and separate property in the hands of the holders * * * for purposes of taxation," the Legislature of Georgia has not expressly done so.

Surely, the "legislative intent" so earnestly searched for by Judge Newman is found expressly stated in the Act above quoted.

APPENDIX.

STATUTES CITED IN BRIEF NECESSARY TO THE DECISION OF THE CASE.

Constitution of Georgia, viz:
Code Sections 5883-5884 5886;
Code Sections 3070, 2165, 780;
Acts 1898, p. 35, 36, Sec. 16, Par. 30, 31, 32;
Acts 1898, p. 29;
Acts 1884–5, p. 28–30.

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may, however, impose a tax upon such domestic animals as, from their nature and habits, are destructive."

Constitution of Georgia, Code Sec. 5883.

"The General Assembly may, by law, exempt from taxation all public property, places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association, kept in a public hall, and not hold as merchandise or for purposes of sale or gain: Provided, the property so exempted be not used for purposes of private or corporate profit or income."

Constitution of Georgia, Code Sec. 5884.

"All laws exempting property from taxation, other than the property herein enumerated, shall be void."

Constitution of Georgia, Code Section 5886.

"Personalty, or personal estate, includes all such property as is movable in its nature; in fact, everything having value inherent in itself, or the representative of value, and not included in the definition of realty. Stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, are personalty."

Code Sec. 3070.

"The stock in said railroad company shall be deemed personal property and shall be transferable in the manner prescribed by the by-laws of the company, and no share shall be transferable until all previous calls thereon shall have been fully paid in. All property, whether real or personal, of any stockholder in this State shall be exempt from the debts or liabilities of said company, except to the amount of the unpaid subscription of said stockholder to the capital stock of said corporation. In no case shall said road be bonded or capital stock increased except by a vote of *two-thirds of the capital stock of said corporation* represented at an annual or a special meeting of stockholders called for that purpose, and after each stockholder has been notified in the manner prescribed for notifying stockholders, and in addition to said notice there shall be published in some newspaper in the town or city where the

principal office of said corporation is located, once a week for four weeks prior to the time of holding said meeting, a notice stating that at said meeting so called an increase of the stock or an in issuance of the bonds of the road would be considered, either or both. No action contemplated under this section looking to an increase of stock or issuance of bonds shall be legal unless there shall be present at said meeting a majority of stock, represented in person or by written proxy."

Code Sec. 2165.

"In addition to the questions now propounded to tax-payers by the tax-receivers, questions *shall* be framed by the Comptroller-General to reach *all property* upon which a tax is imposed by this Act, and especially the following questions * * * *

How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?

What was the gross nominal value thereof?

What was the fair market value thereof?

Acts of 1898, pages 35 and 36, Sec. 16, Par. 30, 31 and 32.

"And provided further, that the agent in this State, of any person, firm or corporation, resident without this State, who shall have on hand for sale, storage or otherwise, as such agent any merchandise or other property, including money, notes, accounts, bonds, *stocks*, etc., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property in this State is taxed."

Acts of 1898, p. 29.

"The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Competroller-General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State.

Code Sec. 780.

1. Section 2 of the Act of 1884-5, entitled.

"An Act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes.

"Section 2. Be it further enacted, That personal property shall be construed, for purposes of taxation, to include all goods, chattels, monies, credits and effects, whatsoever they may be, all ships, boats and vessels belonging to the inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due the person to be taxed; *all stocks and securities*, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt by the laws of the United States or of this State."

See Georgia Laws of 1884-5, pages 28 and 30.

Respectfully submitted,

BOYKIN WRIGHT,
JOHN C. HART,
Solicitors for Petitioners.